Supreme Court, U. S.
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PETITIONER'S BRIEF

SUPREME COURT OF THE UNITED STATES

October Term, 1975

74-
No. 1303

CARL D. BISHOP,

Petitioner,

v.

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

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CITATIONS TO OPINIONS BELOW

The January 31, 1975, opinion of the United States Court of Appeals for the Fourth Circuit is not published. This

opinion was rendered after a rehearing en banc. The initial opinion of the United States Court of Appeals for the Fourth Circuit is published at 498 F.2d 1341 (1974). This action originated in the United States District Court for the Western District of North Carolina. The district court's opinion is published at 377 F.Supp. 501 (1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 31, 1975. Petition for writ of certiorari was filed in the Court on April 16, 1975, within the time provided by 28 U.S.C. sec. 2101 (c). Jurisdiction of the Court is invoked under 28 U.S.C. sec. 1254 (1). Jurisdiction of the court of first instance in the United States District

Court for the Western District of North Carolina was founded upon 42 U.S.C. sec. 1983, 28 U.S.C. sec. 1343(3), and 28 U.S.C. sec. 1331(a).

QUESTIONS PRESENTED

1. Whether a public employee, who has completed his probationary period and has become a permanent employee, and who can be discharged only for certain statutory reasons, has the right not to be discharged without notice and hearing.

2. Whether a policeman can be constitutionally dismissed without notice and hearing, when charged with not following orders, insubordination, causing low morale, and engaging in conduct unsuited to an officer.

3. Whether giving a public employee oral notice at time of dismissal followed by written reasons, fulfills procedural

due process requirements.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CODE OF ORDINANCES OF THE CITY OF MARION, NORTH CAROLINA

Personnel Ordinance

> A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee

> fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given a written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice. (A. 6-7,15).

STATEMENT OF THE CASE

PROCEEDINGS IN THE LOWER COURTS

Petitioner, a former police officer of the City of Marion, North Carolina, brought an action in the United States District Court for the Western District of North Carolina, Shelby Division, against respondents, W. H. Wood, Chief of Police, Victor Denton, City Manager, and the City of Marion, North Carolina, pur-

suant to 42 U.S.C. sec. 1983, contending that his rights under the Fourteenth Amendment were violated when he was discharged from his police job. He sought an order requiring respondents to reemploy him and a back pay award. (A. 3-10).

Cross-motions for summary judgment were filed. The district court granted respondents' motion for summary judgment and dismissed the action by opinion and order entered August 29, 1973. 377 F.Supp. 501 (1973). (Petition for Certiorari, pp. 12-24). The United States Court of Appeals for the Fourth Circuit in its initial decision of June 21, 1974, adopted per curiam the judgment of the district court, over the dissent of Judge Winter. 498 F.2d 1341 (1974). (Petition for Certiorari, pp. 25-29). A petition for rehearing en banc was granted by the

Court of Appeals, and on January 31, 1975, an order was entered affirming the judgment of the district court "by an equally divided court". (Petition for Certiorari, p. 30).

STATEMENT OF FACTS

Petitioner Carl D. Bishop was employed as a policeman on June 9, 1969, by respondents, the Chief of Police and City Manager of Marion, North Carolina. (A. 57-58). He successfully completed the required six month probationary term, and was thereafter classified as a permanent employee of the City. (A. 19,24; Petition for Certiorari, p. 13).

The Marion Personnel Ordinance provides that the only permanent employees subject to dismissal are those who (1) fail to perform work up to standard, (2) are negligent, (3) are inefficient, or

(4) are unfit to perform duties; and that permanent employees cannot be discharged unless, first, they are notified of the deficiency, and second, they continue to perform in the deficient manner. (A. 6-7).

After nearly three years of uninterrupted service on the police force, petitioner was summarily discharged by respondents on March 31, 1972. (A.4-5, 13-14). No hearing either before or after the dismissal was granted petitioner. (A. 7,15). Petitioner's evidence, which is substantially uncontradicted, is that the Chief of Police and City Manager refused to discuss the matter with him when he was discharged. He was told by the City Manager, "If you pursue this matter any more, it will get worse." (A. 39-40). In response to his request, petitioner was later given a written

statement of the reasons for his discharge. (A. 14).

The Chief of Police, advancing his reasons for the firing, stated that petitioner had not followed orders concerning radio classes, high speed chases, checking business establishments and making routine patrols, had been insubordinate, had caused low marale, and that a complaint had been received that he engaged in conduct unsuited to an officer. (A. 32-34).

With respect to the allegation that he had disobeyed orders concerning attendance of radio school, petitioner showed that he had just cause to be absent from the radio training sessions he missed. When one of the sessions was scheduled, and as he was on his way to class, a State Bureau of Investigation agent and

a State Highway Patrolman asked him to take part in a drug raid. (Supporting statements by the patrolman and agent are in the record. (A. 43-44, 53-56).). When a second session was scheduled, he was so ill with the intestinal flu at home that he doesn't believe he could have gotten from the bathroom to the telephone to call in an excuse had he thought to do so. When a third session was scheduled, he was on vacation and would have attended anyway, but received word the session was postponed. When this session was rescheduled, it was in conflict with petitioner's plans to go to another city to fill out his income tax returns that were soon to be due, and he sent his excuse to the police chief in advance. Petitioner attended all other training sessions required of members of the Marion

Police Department, receiving certificates and credits for courses in riot control, self defense and small arms. (A. 42-45, 49-52).

As to the other allegations of not following orders, petitioner stated that he was never given any orders pertaining to checking business establishments or answering routine patrol calls, and that after he and several other officers were instructed as a group not to engage in high speed chases outside the city limits, he never again made a pursuit of this type. (A. 41).

Petitioner's evidence, including affidavits from officers still on the police force, was that he was always cooperative with fellow officers, that he always accepted and carried out orders given by his supervisors, that he was not the

cause of any low morale, and that he never told the Chief of Police he had other jobs to do in order to support his family. Further he has no notice or knowledge of any accusation by a supervisor that he had engaged in conduct unsuitable to an officer; he does not believe any of his conduct could have been interpreted in this way; and the supervisor in question had done nothing but praise his conduct as a policeman. (A. 45-47, 57-64).

Petitioner had the highest arrest rate and one of the highest conviction rates of any policeman on the force. (A. 59-60, 63-64, 65-67). He believes that he was discharged because he enforced the law fairly and equally and without evincing any political or social favoritism. (A. 6).

SUMMARY OF THE ARGUMENT

I. A Public Employee, Who Has Completed his Probationary Period and has Become a Permanent Employee, and who can be Discharged Only for Certain Statutory Reasons, has the Right not to be Discharged Without Notice and Hearing.

Public employees have constitutionally protected property rights in their continued employment if they have contractual, statutory, or other objective expectancy that their jobs will not be terminated. These protections are available to a policeman.

A. Petitioner's Employment Rights Were Grounded in Statute.

The Marion Personnel Ordinance allows permanent employees to be dismissed only if they fail to perform work up to

standard, are negligent, are inefficient, or are unfit; and only after they are first notified of the deficiency and, second continue to perform in a deficient manner. This ordinance creates statutory rights of continued employment, which are protected under the Fourteenth Amendment.

B. Petitioner Had an Implied Promise or Other Objective Expectancy of Continued Employment.

Petitioner was classified as a permanent employee by the City of Marion, having successfully completed his probationary term. Permanent employees, who are no longer in a training or probationary status, have the objective expectancy of continued employment, so that they have a due process property interest in their job, in the absence of statute or

contract provision to the contrary.

II. A Policeman cannot Constitutionally be Dismissed without Notice and Hearing, when Charged with not Following Orders, Insubordination, Causing Low Morale, and Engaging in Conduct Unsuited to an Officer.

If a public employee is accused of misconduct, he has a constitutional liberty right, which requires that procedural due process be observed in discharging him. In this case petitioner was allegedly discharged for insubordination, causing low morale, engaging in conduct unsuited to an officer, refusing to cooperate with other officers, and violating orders of his superiors. These charges against petitioner were of such a nature that his constitutional liberty interests made it necessary to adhere to

due process in the discharge procedure.

III. Giving a Public Employee Oral Notice at Time of Dismissal Followed by Written Reasons, does not Fulfill Procedural Due Process Requirements.

Petitioner was given oral notice of summary discharge. He was not then given reasons for the dismissal, but upon request he received a post-discharge written statement of reasons. He was not warned, counseled, or advised about his conduct before being fired. No hearing was held either before or after discharge. The Marion Personnel Ordinance requires that before being discharged an employee be notified of the deficiency in his work

and be told how to remedy it, and that he fail to correct the deficiency. Respondents' failure to follow the procedures contained in this ordinance in firing petitioner, as well as their refusal to accord petitioner a hearing, denied him the due process of law.

ARGUMENT

I. A PUBLIC EMPLOYEE, WHO HAS COMPLETED HIS PROBATIONARY PERIOD AND HAS BECOME A PERMANENT EMPLOYEE, AND WHO CAN BE DISCHARGED ONLY FOR CERTAIN STATUTORY REASONS, HAS THE RIGHT NOT TO BE DISCHARGED WITHOUT NOTICE AND HEARING.

In Board of Regents v. Roth, 408 U.S. 564, 567-78, n.16 (1972), and Perry v. Sindermann, 408 U.S. 593, 601-02 (1972) this Court delineated conditions under which public employees cannot be discharged without the observation of procedural due process requirements;

(a) Where an office is held under tenure provisions;

(b) During the term of an existing employment contract;

(c) Where the right to employment is grounded in statute;

(d) Where there is a clearly implied promise of continued employment;

(e) Where the employment practices in question have evolved into a "common law" of continued employment;

(f) In any other situation in which the employee has an objective expectation of continued employment (more than an abstract need, desire or unilateral expectation of continued employment).

These cases concerned employment rights of members of the teaching profession, but certainly the Court intended these job security rights to extend to governmental employees generally, federal, state and local. This was confirmed by Arnett v. Kennedy, 416 U.S. 134 (1974), involving a federal civil service em-

ployee, a field representative of the Office for Economic Opportunity. "Policemen, like teachers and [government administrators] . . . are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967). Petitioner's dismissal was subject to the limitations enunciated in Roth and Sindermann.

A. PETITIONER'S EMPLOYMENT RIGHTS WERE GROUNDED IN STATUTE.

As an employee of the City of Marion, North Carolina, petitioner was subject to the Marion Personnel Ordinance, which provided:

> A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if the work is to be satisfactory.

> If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. (A. 6-7).

According to this ordinance, the only permanent employees subject to dismissal are those who (1) fail to perform work up to standard, (2) are negligent, (3) are inefficient, or (4) are unfit to perform duties. And these employees may not be discharged unless, first, they are notified of the deficiency; and, second, they continue to perform in the deficient manner.

There is a protected Fourteenth Amendment property interest in a public job if statutory provisions guarantee continued employment absent sufficient cause for discharge. Board of Regents v.

Roth, 408 U.S. at 576-78. Following Sinderman and Roth, the lower courts found constitutionally protected property interests in employment in the contexts of state and local legislation including civil service laws, Snead v. Department of Social Services, 355 F.Supp. 764 (S.D.N.Y. 1973), vacated and remanded, 416 U.S. 977 (1974), on remand, case no. 72 Civ. 4536, Nov. 18, 1974; veterans' preference statutes, Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972); and teacher tenure legislation, Sigmon v. Poe, 381 F.Supp. 387 (W.D. N.C. 1974). This Court applied the Sindermann-Roth principles to the federal civil service laws in Arnett v. Kennedy. Consistent with this authority it must be held that the Marion Personnel Ordinance, which enumerates causes for dismissal and requires the opportunity for warning and

reform, creates a right of employment grounded in statute, to which the procedural due process requirements adhere.

B. PETITIONER HAD AN IMPLIED PROMISE OR OTHER OBJECTIVE EXPECTANCY OF CONTINUED EMPLOYMENT.

According to the ordinances and practices of the City of Marion, newly hired policemen and other employees are probationary employees for the first six months and thereafter they are permanent employees. (A. 19,24; Petition for Certiorari p. 13). Petitioner had served as a policeman for nearly three years at the time of his discharge. (A. 4-5, 13-14).

Petitioner's position, alternative to that asserted in Argument I.A., supra., is that once a government worker successfully completes probationary or appren-

ticeship and becomes a permanent employee, he has a property right which necessitates that his discharge comport with due process requirements.

In Roth the Court indicated that the property interests subject to due process protection, are not created by the Constitution, but are defined by rules and understandings derived from the employer-employee relationship in the context of local law, common practice and agreement. 408 U.S. at 577. Neither the City of Marion nor the State of North Carolina has expressly guaranteed trial type pre-discharge proceedings for employees in petitioner's situation. Thus, according to Roth it is incumbent on the Court to take a common sense view of the

common practices of employment carried on by this municipality.

Probationary employees have no constitutionally protected property interest in continued employment (absent agreement or law to the contrary). Jenkins v. U.S. Post Office, 475 F.2d 1256 (9th Cir. 1973); Harnet v. Ulett, 466 F.2d 113 (8th Cir. 1972). On the other hand, there should be no question but what the employee, who has spent most of his working years in government service, whose record is unblemished, who has been re-employed or retained year after year, has the objective expectancy of continued employment contemplated by Roth and Sindermann that triggers due process protections.[1]

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[1] Compare the Fourth Circuit's decision in the instant case (Petition for Certiorari, pp. 12-22, 25-26) with its decision in Johnson v. Fraley, 470 F.2d 119 (4th Cir. 1972) (29 years of service).

The public servant of longstanding employment has a continuing need and expectation of his job. In Bell v. Burson, 402 U.S. 535 (1971), the Court held that a driver's license, once issued, cannot be suspended without observing due process requirements. There the Court characterized the continued possession of a license as possibly "essential in the pursuit of a livelihood". 402 U.S. at 539. In the present case the due process guarantees are even more essential, because it is the livelihood itself that is at stake.

Where along this continuum from trainee to lifetime career employee should the constitutionally protected property interest emerge? The logical transitional point is where the employee completes his probationary period and is appointed a permanent employee. At this point

training, apprenticeship, and orientation are over; career status has begun. The term "permanent" is clearly consistent with the concepts of objective expectancy and implied promise of continuance that the Court dealt with in Roth and Sindermann. See pp. 18-19, supra. Of course, by law the federal, state or municipal legislative body, or by contract the employer and employee, can make a different determination, and that determination would be controlling, Roth, 408 U.S. at 577, but in the absence of law or agreement to the contrary, the transition from probationary employee to permanent employee should create the property right.

It is instructive that the typical

civil service law[2] and the typical collective bargaining contract[3] provide for job security once the probationary or training period is completed.[4] Since there is a great deal of overlap of protection

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[2] Collected in Smith & Geballa, Job Security for Public Employees, 31 Washington & Lee L.Rev., 545, 567-71 (1974).

[3] See Public Workers and Public Unions [Zagoria ed. 1972].

[4] More than 90% of all police departments subject to a survey reported that new appointees serve at first on probationary status. President's Commission on Law Enforcement, Task Force Report: The Police 132 (1967). The probationary period is used by police agencies to evaluate performance, to train and test the recruit with the practical problems of field work, to counsel him and assist in overcoming his faults. Municipal Police Administration 180-81 (George D. Eastman ed. 1971). The probation period affords an opportunity for "dismissing the inept recruit in the early stages of his service . . . before he has acquired the extraordinary protection thrown about him by tenure-of-office acts." Bruce Smith, Police Systems in the United States 132 (1960).

to public employees from procedural due process rights, collective bargaining contracts, and civil service laws, i.e., a government worker may have his job security protected simultaneously from two or more of these sources, such symmetry will tend to avoid forum shopping, jurisdictional conflicts, and other confusion and inconvenience.

If the view that constitutionally protected property rights inure upon achievement of permanent status were not accepted, the promises of Roth and Sindermann will be unfulfilled. In these cases due process protection is specifically accorded the holders of positions under tenure provisions, persons with employment contracts, and those whose rights are grounded in statute. But these cases go

further and hold Fourteenth Amendment property rights exist where there is any "objective expectancy" of continued employment, as well as where there is a clearly implied promise or where practices have evolved into a "common law" of continued employment. Board of Regents v. Roth, 408 U.S. at 576-78, n.16, Perry v. Sindermann, 408 U.S. at 601-02. These latter categories clearly have some application apart from cases where statutory and contract rights are present; else the Court would not have enumerated them. The conclusion is inescapable that a public employee who has completed probation and has achieved permanent status has an objective expectancy of continued employment that is subject to Fourteenth Amendment guarantees. Accord, Zimmerer v. Spencer, 485 F.2d

176 (5th Cir. 1973); Puckett v. Mobile City Commission, 380 F.Supp. 593 (S.D. Ala. 1974).

II. A POLICEMAN CANNOT CONSTITUTIONALLY BE DISMISSED WITHOUT NOTICE AND HEARING, WHEN CHARGED WITH NOT FOLLOWING ORDERS, INSUBORDINATION, CAUSING LOW MORALE, AND ENGAGING IN CONDUCT UNSUITED TO AN OFFICER.

In Board of Regents v. Roth, 408 U.S. 564, 573 (1972), the Court established that a public employee's right to liberty is violated, when he is discharged without notice and hearing after having been accused of misconduct. In Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), the Court had decided that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Roth requires that procedural due process be satisfied before an employee is dismissed where a charge has been made "that might seriously damage his standing and associations in the community . . ., for example, that he has been guilty of dishonesty, or immorality." 408 U.S. at 573.

The Court in Roth expressed a concern about the likelihood of the government's imposition on the employee of a "stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573. The right to "liberty" includes the right "to engage in any of the common occupations of life". Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Where future employment opportunities are threatened or foreclosed, procedural due process applies. Joint Anti-Fascist Refugee Committee v. McGrath,

341 U.S. 123, 185 (1951) (Jackson,J., concurring); Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957).

In this case the respondents' alleged reasons for discharging petitioner were that he was insubordinate, caused low morale, engaged in conduct unsuited to a police officer, refused to cooperate with other officers, and violated orders of his supervisors. (A. 32-34). As Circuit Judge Winter correctly said in his dissenting opinion, "Accusations of this nature made against one engaged in the occupation of a law enforcement officer manifestly have a severe adverse impact upon future employment opportunities, and it can be reasonably expected that defendants would disclose these reasons upon the request of a person considering plaintiff's employment who inquired of

the respects in which plaintiff's work had been unsatisfactory. To my mind, it therefore follows that procedural due process should apply, and as a minimum plaintiff should have been given notice of and afforded an opportunity to refute the charges before he was dismissed." (Petition for Certiorari, p. 28).

The authorities on the subject are unanimous in the view that applicants for police jobs must be and are subjected to rigorous background investigations and that only those who are reported to possess the highest order of character should be employed. "The need for public trust respect, and confidence in the police service, and the responsibilities entrusted to police officers, preclude employment of the dishonest, the immature, the lazy, the

immoral, or the unreliable."[5] The charges made against petitioner of defiance of orders, insubordination, causing low morale, and acts "unsuited to an officer" most certainly would stand in the way of his ob-

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[5] National Advisory Commission on Criminal Justice Standards and Goals, Police 339-40 (1973). Accord, Municipal Police Administration 178 (G.D. Eastman ed. 1971). Nearly 98% of the cities surveyed reported that background character investigations of applicants for police jobs are used. President's Commission on Law Enforcement, Task Force Report: The Police 129 (1967). See Goss v. Lopez, ___ U.S. ___, 95 S.Ct. 729 (1975), where the Court found a constitutionally protected liberty interest on the part of a school child threatened with disciplinary proceedings in part because of the probable effect that the record of such charges would have on future employment opportunity.

taining another job in his chosen field. See Casey v. Roudebush, 395 F.Supp. 60 (D.C.Md. 1975) (Discharged policeman had protected liberty interest where charges would likely interfere with future employment in this occupation.).

Petitioner's affidavits are to the effect that each of these charges was baseless and could have been established to be so, had he been given the hearing to which he was entitled. Since this case was decided on summary judgment, the truth of petitioner's affidavits must be assumed here. Rule 56, Rules of Civil Procedure.

The lower courts, this case excepted, have uniformly held that notice and hearing are required, when stigmatizing charges have been made against a public employee. E.g., Sims v. Fox, 492 F.2d

1088 (5th Cir. 1974) (unfitness and unsuitability) and Simmonds v. Government Employees' Service Commission, 375 F.Supp. 934 (D.C.V.I. 1974) (insubordinate and continuing to fail to comply with rules and regulations).[6]

Because the charges that brought about petitioner's dismissal put his good name, reputation, honor, and integrity in issue, he was entitled to notice and hearing by the Court's decision in Roth.

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[6] Compare the Fourth Circuit's decision of the present case to its decision in McNeil v. Butz, 480 F.2d 314 (4th Cir. 1973), that government workers discharged for improperly procuring agricultural program payments, were entitled to procedural due process because of deprivation of liberty.

III. GIVING A PUBLIC EMPLOYEE ORAL NOTICE AT TIME OF DISMISSAL FOLLOWED BY WRITTEN REASONS, DOES NOT FULFILL PROCEDURAL DUE PROCESS REQUIREMENTS.

Because petitioner had both a property interest (Argument I, supra.) and a liberty interest (Argument II, supra.) in continued employment, he could be constitutionally dismissed only if procedural due process requirements were satisfied.

Petitioner was summarily discharged. His affidavits are to the effect that an explanation of the basis for the dismissal was not given at the time, and that in fact the Chief of Police and City Manager refused to discuss the matter with him. (A. 7, 39-40). Respondents' affidavits are not clear on this point.

(A. 30-31). On summary judgment it was unquestionably erroneous for the district court to find that petitioner was given a statement of reasons at the time of discharge. (Petition for Certiorari, p. 15). Rule 56, Rules of Civil Procedure. It is agreed that petitioner was later given a written statement of reasons for the discharge. (A. 5-6). Petitioner's affidavit establishes that before discharge he was never notified that his work was deficient, nor told what he must do to make his performance satisfactory. (A. 5, 41-42).

Of course, there was no pre- or post-discharge hearing, petitioner was never able to confront and examine his

accusers, he was never given the opportunity to respond to or present his position about the charges, he was not permitted to offer evidence in his behalf, and he was not even allowed to discuss the reasons for termination with his employer.

The Personnel Ordinance of the City of Marion requires that to effect the dismissal of a permanent employee, it is necessary (1) to notify him of the deficiency in his work and tell him what he must do to render it satisfactory, (2) that the employee continue to be a substandard performer, negligent, inefficient or unfit, (3) upon request he be given a written notice of the discharge setting forth the reasons.

This summary judgment record establishes requirement number (3) as the only one that was satisfied in connection with petitioner's dismissal.

In Arnett v. Kennedy, 416 U.S. 134 (1974) a plurality opinion of this Court expressed that the post-discharge hearing provided in the Lloyd-LaFollette Act was not constitutionally deficient, because this provision was a part of the same statute which granted the Roth-Sindermann substantive right to continued employment, and the substantive right cannot be claimed without accepting the procedure that goes along with it. An analysis of the various opinions of the court led Justice White to conclude in his concurring and dissenting opinion, that a hearing was constitutionally,

as well as statutorily, necessary. "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it at least six members of the Court are in agreement on this fundamental proposition." 416 U.S. at 185.

Recently the Court has relaxed the constitutional requirements for administrative due process by balancing competing interests of control, safety, and security in the contexts of prison and public school disciplinary proceedings. Wolff v. McDonald, 418 U.S. 539 (1974); Goss v. Lopez, ____ U.S. ____, 95 S.Ct. 729 (1975). In neither situation did the Court countenance dispensing with a hearing altogether.

Because the discharge of a public

employee does not entail problems analagous to the concern for control, safety, and security present in public school and prison disciplinary situations, it is required that the full panoply of procedural due process notice and hearing rights, as outlined in Goldberg v. Kelly, 397 U.S. 254 (1970), apply in the present case:

1. Timely and adequate notice of the charges.
2. Confrontation and cross examination of adverse witnesses.
3. Presentation of his own evidence and arguments.
4. Representation by retained counsel.
5. Reasoned decision based on the evidence.
6. Impartial decision makers.

At least six members of this Court,

Arnett v. Kennedy, 416 U.S. at 185, are on record as requiring a full and fair hearing incidental to the discharge of a public employee. "The fundamental requisite of due process of law is the opportunity to be heard". Grannis v. Ordean, 234 U.S. 385, 395 (1914). Even applying the tests of the Arnett plurality opinion, petitioner's constitutional rights were violated, since two of the three procedural requirements of the Marion Personnel Ordinance were not satisfied.

By no application or reasonable extension of any prior decision of this Court, or of any recognized constitutional principle, can it be said that petitioner's discharge was consistent with procedural due process of law.

CONCLUSION

For the reasons set forth above, it

is respectfully prayed that the decision of the United States Court of Appeals for the Fourth Circuit be reversed, and this case be remanded with directions that it be tried on its merits.

Respectfully submitted,

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* The prosecution of this proceeding is sponsored by the North Carolina Civil Liberties Legal Foundation, Inc.